

**STATE WATER RESOURCES CONTROL BOARD
UNDERGROUND STORAGE TANK CLEANUP FUND REGULATIONS
TITLE 23, DIVISION 3, CHAPTER 18, CALIFORNIA CODE OF REGULATIONS**

**AMENDMENTS TO UNDERGROUND STORAGE TANK CLEANUP FUND
REGULATIONS**

TEXT OF REGULATIONS

Amend title 23, Division 3, Chapter 18 of the California Code of Regulations to read as follows:

Article 1. General Provisions

2803. Applicability

...

- (d) This chapter provides for reimbursement from the Underground Storage Tank Cleanup Fund (Fund) of eligible corrective action, regulatory technical assistance, and third party compensation ~~claim~~ costs incurred by eligible owners and operators of underground storage tanks and residential tanks (article 4).

Authority: Section 25299.77, Health and Safety Code.

Reference: Sections 25299.10, 25299.11, 25299.13, 25299.31, 25299.39.2, 25299.51, 25299.56, 25299.57 and 25299.58, Health and Safety Code.

Article 2. Definition of Terms

2804. Definitions

Unless the context clearly requires otherwise, the terms used in this chapter shall have the following meanings:

...

“**Annual revenue**” with respect to public entities, means the total annual general purpose revenues, excluding all restricted revenues over which the governing agency has no discretion,

as reported in the annual Report of Financial Transactions submitted to the Controller, for the latest fiscal year ending prior to the date the Fund ~~reimbursement claim~~ application was filed. With respect to nonprofit organizations, this term means the total annual revenues as shown in an annual fiscal report filed with the Registry of Charitable Trusts of state and federal tax records, based on the latest fiscal year ending prior to the date the Fund ~~reimbursement claim~~ application was filed.

...

“Claim” means a ~~written request for payment~~ submittal to the Fund for the reimbursement of costs eligible for reimbursement from the Fund incurred due to an occurrence. A claim consists of several documents, including, but not limited to, the Fund application, reimbursement requests, and verification documents.

...

“Regulatory technical assistance” means assistance from a person other than the claimant in the preparation and submission of a claim to the Fund. Regulatory technical assistance includes assistance with completing and submitting the ~~claim~~ Fund application, reimbursement requests, and supporting documentation, and complying with procurement requirements. Regulatory technical assistance does not include assistance with preparing and pursuing a site closure petition, an appeal to the Division Chief for unpaid claims, a petition for unpaid claims, or an action in court.

...

“Residence” means ~~real property which is improved with an owner-occupied single family dwelling or duplex~~ a building that is used primarily for dwelling purposes. Buildings excluded from the definition include, but are not limited to, hotels, motels, hospitals, and military barracks.

“Residential tank” means a tank, as defined in Health and Safety Code section 25281, subdivision (~~tu~~), including pipes connected thereto, that ~~meets~~ satisfies all of the following conditions:

(a) The tank is used for the storage of petroleum.

(b) The tank is substantially or totally beneath the surface of the ground.

(c) ~~(i)~~ The tank meets either (1) or (2) below:

(1) The tank is located at the residence of a person on property used exclusively for residential purposes at the time of discovery of the unauthorized release; or

(2) The tank is located at the residence of a person, the tank is located on property ~~which~~ that on ~~or~~ and after January 1, 1985, has not been used for agricultural purposes, the tank has a

capacity of 1,100 gallons or less, and on ~~or~~and after January 1, 1985, the petroleum in the tank has been used ~~solely for the sole purpose of storing~~as home heating oil for consumptive use on the premises where stored.

(d) The tank meets both (1) and (2) below:

(1) The tank meets one of the following:

(A) The tank has a capacity greater than 1,100 gallons; or

(B) The tank is not located on a farm; or

(C) The tank does not store motor vehicle fuel used primarily for agricultural or resale purposes.

(2) and~~o~~n or after January 1, 1985, the tank has not been used ~~primarily~~ to store motor vehicle fuel used primarily for agricultural or resale purposes.

“**Site**” means the parcel of real property at which an underground storage tank or residential tank is located, subject to the following limitations:

(a) If underground storage tanks or residential tanks are located at adjacent parcels of real property, the adjacent parcels together constitute one site if both of the following apply:

~~(1)~~ The underground storage tanks are, or have been, operated by the same person.

~~(2)~~ The adjacent parcels are under common ownership or control.

(b) Notwithstanding subdivision (a), the Board may consider a parcel of real property as consisting of multiple sites, corresponding to the number of distinct underground storage tank or residential tank operations at the parcel, if the Board makes both of the following findings:

~~(1)~~ There is more than one underground storage tank or residential tank located at the parcel.

~~(2)~~ Each separately operated underground storage tank, residential tank, or group of underground storage tanks and residential tanks is not, and has not been, operated by a person who is operating or has operated another underground storage tank or residential tank at the same parcel.

...

“**Underground storage tank**” means an underground storage tank as defined in Health and Safety Code section 25281, subdivision (~~x~~y), except that “underground storage tank” means only those underground storage tanks that ~~are defined as petroleum underground storage tanks under the Federal Act~~contain only petroleum or, consistent with Federal Act, a mixture of

petroleum with de minimis quantities of other regulated substances. “Underground storage tank” does not include any structures specifically exempted under California Code of Regulations, title 23, section 2621.

Authority: Section 25299.77, Health and Safety Code.

Reference: Sections 25281, 25299.11-25299.25, 25299.31, 25299.37, 25299.52, 25299.54(e)(1)-(2), 25299.55, 25299.57, 25299.58 and 25299.61, Health and Safety Code; and 40 Code of Federal Regulations Section 280.12.

Article 4. The Fund

2810. Types of ~~Claims-Costs Permitted~~Reimbursed

(a) A claimant may submit a claim to the Fund for the reimbursement of the following types of ~~claims-costs against the Fund:~~ incurred due to an occurrence:

(1) ~~a claim for reimbursement of~~ corrective action costs incurred for work performed on or after January 1, 1988;

(2) ~~a claim for reimbursement of~~ third party compensation costs;

(3) ~~a claim for~~ regulatory technical assistance costs incurred for work performed on or after January 1, 1997; or

(4) any combination of the foregoing types of claims costs.

(b) ~~A claimant may submit only one claim per cost.~~ A claimant must submit a separate claim for each occurrence. Multiple owners and operators of a site may submit joint claims.

Authority: Section 25299.77, Health and Safety Code.

Reference: Sections 25299.13, 25299.51(f) and (i), 25299.54(a), 25299.55(c), 25299.57 and 25299.58, Health and Safety Code.

2810.1. Eligible Claimants

(a) Only a current or former owner or operator of an underground storage tank or residential tank who has paid or will pay for the costs ~~being claimed for which reimbursement from the Fund is requested~~ may file a claim against the Fund. In order to file a claim request for reimbursement of ~~for~~ third party compensation costs, the owner or operator must be eligible to file a claim request for reimbursement of ~~for~~ corrective action costs for the site at which the

unauthorized release occurred, and the judgment, arbitration award, or settlement must have been entered or approved after January 1, 1988.

...

Authority: Section 25299.77, Health and Safety Code.

Reference: Sections 25299.10, 25299.13, 25299.37(a)-(c), 25299.51(f) and (i), 25299.54, 25299.55, 25299.57 and 25299.58, Health and Safety Code.

2811. Permitting and Other Eligibility Requirements

(a) An owner or operator of an underground storage tank or a residential tank for which a permit is required under section 25284 of the Health and Safety Code shall be entitled to reimbursement for eligible corrective action, regulatory technical assistance, and third party compensation costs if all of the following are met:

(1) There was an unauthorized release of petroleum from the underground storage tank or residential tank.

(2)(A) Except as provided in subdivision (B), the claimant obtained or applied for any has complied with the permit required requirements of by chapter 6.7 (commencing with section 25280), if the underground storage tank or residential tank that is the subject of the claim was installed on or after January 1, 1990.

(B) If the underground storage tank or residential tank that is the subject of the claim was installed before January 1, 1990, and the claimant owned or operated the tank before January 1, 1990, then the claimant must have obtained any permit required by Health and Safety Code, division 20, chapter 6.7, or filed a substantially complete application for any required permit on or before January 1, 1990. If the underground storage tank or residential tank that is the subject of the claim was installed before January 1, 1990, and the claimant did not obtain or file for a permit as required by Health and Safety Code section 25284 on or before January 1, 1990, then the claimant may obtain seek a waiver of the permit requirement to obtain a permit, as set forth in subdivisions (A)1. and (B)2. below.

(A)1. For claims filed prior to before January 1, 1994, a claimant may obtain a waiver of the permit requirement to obtain a permit required by Health and Safety Code section 25284 if the claimant owned or operated the tank before January 1, 1990, and demonstrates to the satisfaction of the Division that obtaining or applying for a permit as required was beyond the claimant's reasonable control of the claimant, or that under the circumstances of the particular case, it would be unreasonable or inequitable to impose the permit requirement to obtain a permit. Any claimant who obtains a waiver of the permit requirement to obtain a permit pursuant to this subdivision shall pursue with reasonable diligence and obtain any permit required by Health and Safety Code, division 20, chapter 6.7.

~~(B)2.~~ For claims filed on or after January 1, 1994, and for claims filed before January 1, 1994, but where the claimant is not granted a waiver pursuant to subdivision 1. above, a claimant may obtain a waiver of the ~~permit~~-requirement to obtain a permit required by Health and Safety Code section 25284 if the claimant owned or operated the tank before January 1, 1990, and demonstrates all of the following to the satisfaction of the Division:

~~(i)a.~~ The claimant was unaware ~~of the permit requirement before prior to~~ January 1, 1990, of the requirement to obtain a permit, and the claimant did not intentionally avoid the requirement or associated fees at any time.

~~(ii)b. Prior to filing a claim~~Before submitting the application to the Fund, the claimant complied with the financial responsibility requirements set forth in section 25299.31 of the Health and Safety Code.

~~(iii)c. Prior to filing a claim~~Before submitting the application to the Fund, the claimant paid for and obtained any currently required permit.

~~(iv)d. Prior to filing a claim~~Before submitting the application to the Fund, the claimant paid all currently due ~~storage~~-fees, interest, and penalties imposed pursuant to Health and Safety Code, division 20, chapter 6.75, article 5 (commencing with section 25299.440) and Revenue and Taxation Code, division 2, part 26 (commencing with section 50101) ~~of the Health and Safety Code, and all prior fees due on and after January 1, 1991 for the underground storage tank that is the subject of the claim.~~

(C) A claimant to whom the Division grants a waiver pursuant to subdivision (B)2. shall obtain a level of financial responsibility in an amount twice as great as the amount ~~which that~~ the claimant is otherwise required to obtain pursuant to section 25299.32 of the Health and Safety Code. The Division may waive the requirements of this subdivision if the claimant can demonstrate that the conditions specified in subdivisions ~~(i-iv)~~(B)2.a., b., c., and d. above were satisfied ~~prior to before~~ the release resulting in contamination. That demonstration may be made through a certification issued by the permitting agency based on site and underground storage tank tests at the time of permit application, or in any other manner acceptable to the Division.

(3) The claimant has complied with any applicable financial responsibility requirements.

(4) On or after January 1, 1988, the claimant was required to perform corrective action pursuant to Health and Safety Code, division 20, chapter 6.7, Water Code, division 7, or section 25299.37 of the Health and Safety Code. If the claimant knew of the unauthorized release of petroleum that is the subject of the claim before January 1, 1988, and failed to initiate corrective action on or before June 30, 1988, then the claimant may not file a claim against the Fund.

(5) Any corrective action performed before December 2, 1991, was performed in accordance with Health and Safety Code, division 20, chapter 6.7 and Water Code, division 7. Any corrective action performed on or after December 2, 1991, was performed in accordance with California Code of Regulations, title 23, division 3, chapter 16, article 11. Any corrective action performed was performed in accordance with the written or oral directives of the appropriate

regulatory agency. If oral directives are relied upon, the claimant shall provide a written statement from the regulatory agency certifying that the directives were issued or other verification as may be acceptable to the Division.

(6) The claimant paid all currently due fees, interest, and penalties imposed pursuant to Health and Safety Code, division 20, chapter 6.75, article 5 (commencing with section 25299.40) and Revenue and Taxation Code, division 2, part 26 (commencing with section 50101) for the underground storage tank that is the subject of the claim.

(b) An owner or operator of a residential tank for which a permit is not required under section 25284 of the Health and Safety Code shall be entitled to reimbursement for eligible corrective action, regulatory technical assistance, and third party compensation costs only if the conditions set forth in subdivisions (a)(1) and (3) of this section are met, and if any corrective action performed was required to be performed by the regulatory agency and was performed in accordance with the written or oral directives of the regulatory agency. If oral directives are relied upon, the claimant shall provide a written statement from the regulatory agency certifying that the directives were issued or shall provide such other verification as may be acceptable to the Division.

Authority: Section 25299.77, Health and Safety Code.

Reference: Sections 25299.13, 25299.37(a)-(c), 25299.54, 25299.57 and 25299.58, Health and Safety Code.

2811.2. ClaimFund Application Requirements; ClaimsReimbursement Requests For Corrective Action Costs

A claimFund application for reimbursement of corrective action costs shall contain the following:

(a) ...

(b) ...

...

(g) a statement of the priority class sought by the claimant and the following documentation to support assignment to that priority class:

(1) for Priority Class A, documentation showing that the tank meets the definition of “residential tank” set forth in section 2804~~property on which the residential tank is located was owner-occupied at the time of the discovery of the unauthorized release (e.g., a property tax bill or a utility bill);~~

(2) ...

(3) ...

(h) ...

(i) ...

(j) ...

(k) ...

(1) a copy of any agreement entered into by a claimant where a person agrees to incur costs on behalf of the claimant or where the claimant assigns Fund reimbursement rights to a person;

(m) if a claimant has entered into the agreement described in subdivision (l), documentation that confirms the date of the agreement (e.g., a sworn statement by all parties to the agreement);

(n) any other information or supporting documentation reasonably required by the Division to determine the eligibility, reimbursable amount due, or appropriate priority class of the claim.

Authority: Section 25299.77, Health and Safety Code.

Reference: Sections 25299.13, 25299.37(a),(b) and (e), 25299.52(a)-(b), 25299.54(a)-(e), 25299.55, 25299.57(a),(b),(d) and (f), 25299.58(b)(1),(3) and (4), and 25299.59(c), Health and Safety Code.

2811.3. ~~Claim~~Fund Application Requirements; Reimbursement Requests for Third Party Compensation ~~Claims~~Costs

~~Claims~~A Fund application for reimbursement of third party compensation costs shall contain the following:

(a) the information described in section 2811.2, subdivisions (a) through (h) and, if applicable, subdivisions (l) and (m);

...

Authority: Section 25299.77, Health and Safety Code.

Reference: Sections 25299.13, 25299.37(a),(b) and (e), 25299.52(a)-(b), 25299.54(a)-(d), 25299.55, 25299.57(a),(b),(d) and (f), 25299.58 and 25299.59(c), Health and Safety Code.

2812. General Procedures for Reimbursement

...

(d) Reimbursement requests must include invoices and auxiliary documentation that demonstrate to the Division's satisfaction that the corrective action and regulatory technical assistance costs claimed by a claimant are eligible. Invoices must include, at a minimum, all of the following:

...

(8) if the invoice is for telephone calls or meetings and is submitted to support a ~~claim~~ for request for reimbursement of regulatory technical assistance costs, then the invoice must identify the subject of the telephone calls or meetings and the person contacted; and

...

(g) Within 30 days of receipt of reimbursement from the Fund ~~Aa~~ claimant must pay all reimbursed costs incurred by the claimant, but not yet paid, ~~and claimed against the Fund within 30 days of receipt of reimbursement from the Fund~~. If a claimant has not paid such costs within 30 days, the claimant shall return the unpaid funds to the Board.

...

Authority: Section 25299.77, Health and Safety Code.

Reference: Sections 25299.13, 25299.37(d), 25299.55, 25299.56 and 25299.57, Health and Safety Code.

2812.1. Compliance with Laws; Bid Requirements

...

(d) Claimants are not required to submit proposals or bids when they ~~initially~~ file a ~~claim~~ Fund application, but the Fund will not normally reimburse claimants for any work for which proposals or bids are required until the costs ~~claimed~~ for which reimbursement is requested are supported by at least three proposals or bids. The Fund may waive the three-bid or –proposal requirement if the Division finds that the requirement is unnecessary, unreasonable, or impossible to comply with under the circumstances pertaining to a particular claim.

...

Authority: Section 25299.77, Health and Safety Code.

Reference: Sections 25299.13 and 25299.57, Health and Safety Code.

2812.2. Eligible and Ineligible Costs

...

(e) The following are ineligible corrective action and regulatory technical assistance costs:

...

(7) the cost of testing for non-hydrocarbon contamination that is not associated with corrective action ~~for the specific claim involved~~which is the subject of the claim;

...

Authority: Section 25299.77, Health and Safety Code.

Reference: Sections 25299.10, 25299.14, 25299.51, 25299.57 and 25299.58, Health and Safety Code.

2812.3. Double Payment

(a) A claimant may not receive reimbursement from the Fund for corrective action, regulatory technical assistance, or third party compensation costs that have been or will be reimbursed from another source.

(b) If a claimant receives compensation for corrective action, regulatory technical assistance, or third party compensation costs from the Fund and also receives compensation from a source other than the Fund for the same costs, the claimant will remit to the Fund an amount equal to the sum disbursed from the Fund on account of such costs.

(c) If a claimant has received compensation (such as a settlement payment or a reduction in the cost to acquire an interest in real property) from another source, the Division shall determine whether the claimant will receive a double payment if the Fund reimburses the claimant's corrective action, regulatory technical assistance, or third party compensation costs. If the claimant can demonstrate that the compensation was for costs other than corrective action, regulatory technical assistance, or third party compensation costs, the Division ~~may~~shall not consider the compensation to be a double payment. ~~If a claimant receives compensation from a source other than the Fund, the Division will base its determination regarding the purposes of the compensation on one or more of the following: For that demonstration the claimant must submit to the Division, for its review, all of the following documents:~~

(1) ~~the terms of~~ the written contract (e.g., a settlement agreement) or judgment requiring the payment of compensation to the claimant.

(2) the ~~causes of action~~pleadings in any underlying lawsuit ~~or claim resulting, demands or any other request for compensation that relates to~~ in the compensation paid to the claimant.

(3) the claimant's documentation of actual, ascertainable costs to which the payment of compensation reasonably may be attributed based on the documents described in subdivisions (1) and (2) above. The Division will not allocate the payment to costs that are unsubstantiated.

(4) any other information or supporting documentation reasonably required by the Division to explain the purpose(s) of the compensation received by the claimant.

~~(d) If corrective action, regulatory technical assistance, or third party compensation costs are advanced to a claimant, or incurred on behalf of a claimant pursuant to a written contract, other than an insurance contract, the Division shall not consider the advance to be a double payment so long as the Fund reimbursements are paid over to the person making the advance and the claimant does not benefit, directly or indirectly, from the payover. The Division shall not consider reimbursement of corrective action, regulatory technical assistance, or third party compensation costs that are advanced to a claimant or incurred on behalf of a claimant to be a double payment if:~~

~~(1) the costs are advanced or incurred pursuant to a written contract, other than an insurance contract, that is executed prior to the date the costs are advanced or incurred;~~

~~(2) the contract requires the claimant to remit any reimbursement received from the Fund to the person advancing or incurring the costs;~~

~~(3) the claimant remits the Fund reimbursement to the person who advanced or incurred the costs pursuant to the contract; and,~~

~~(4) the claimant does not benefit, directly or indirectly, from this contractual payment agreement.~~

(e) Notwithstanding subdivision (a), a claimant may receive reimbursement from the Fund for corrective action, regulatory technical assistance, or third party compensation costs if an insurer has advanced the costs pursuant to an insurance contract and either of the following applies:

(1) The insurance contract explicitly coordinates insurance benefits with the Fund and requires the claimant to do both of the following:

(A) maintain the claimant's eligibility for reimbursement of costs from the Fund by complying with all applicable eligibility requirements, and

(B) reimburse the insurer for costs paid by the insurer pending reimbursement of those costs by the Fund.

(2) The claimant received a letter of commitment prior to June 30, 1999, for the occurrence and the claimant is required to reimburse the insurer for any costs paid by the insurer pending reimbursement of those costs by the Fund.

(f) Notwithstanding subdivision (a), when a claimant obtains settlement proceeds or a judgment for costs the Fund would otherwise have reimbursed, the Fund may bear a fair share of the claimant's costs of obtaining the settlement proceeds or judgment.

(1)(A) The Fund's fair share shall be equal to the lesser of 1. or 2. below:

~~(i)~~ 1. the claimant's actual legal fees and legal costs incurred in collecting the settlement or obtaining the judgment ~~in proportion to the ratio~~ multiplied by the fraction of the costs the ~~F~~Fund would otherwise have reimbursed (i.e., the amount calculated as the benefit to the Fund) divided by the total settlement or judgment amount; ~~or, as shown below.~~

$$\frac{\text{(actual legal fees and costs)} \times \left[\frac{\text{benefit to the Fund}}{\text{total settlement or judgment amount}} \right]}{1}$$

~~(ii)~~ 2. thirty (30) percent of the claimant's otherwise reimbursable costs obtained by the settlement or judgment (i.e., the amount calculated as the benefit to the Fund).

(B) The Fund shall deduct its fair share from the amount determined to be a double payment. If, however, the amount of the double payment is greater than the claimant's corrective action costs, the Fund shall pay its fair share to the claimant directly.

(2) The Fund shall not bear a fair share if the person paying the monies to the claimant pursuant to the settlement or the judgment is eligible to file a claim against the Fund and has not waived its ability to file a claim.

(3) The Fund shall not bear a fair share if both of the following are met:

(A) all of the claimant's documented costs that are related to the causes of action alleged in the underlying complaint have been met by the settlement or judgment; and

(B) all of the claimant's documented costs of obtaining the settlement or judgment have been met.

Authority: Section 25299.77, Health and Safety Code.

Reference: Sections 25299.10, 25299.51, 25299.54, 25299.57 and 25299.58, Health and Safety Code.

2812.5. Reimbursement Limitations

...

(b) For each occurrence, a claimant must pay for otherwise eligible costs in the amount of the claimant's level of financial responsibility as set forth in section 2808.1 of this chapter. For each occurrence, the Board may reimburse from the Fund only eligible corrective action,

regulatory technical assistance, and third party compensation ~~claim~~-costs in excess of a claimant's level of financial responsibility.

...

Authority: Section 25299.77, Health and Safety Code.

Reference: Sections 25299.13, 25299.32, 25299.57(a), 25299.58, 25299.59(b) and 25299.60(c), Health and Safety Code.

2813. Creation of Priority Lists

...

(b) Within 60 days of receipt of a new, completed ~~claim~~Fund application that was not included on the previous priority list, the Division will conduct a review of the claim to determine if the claim is eligible.

...

Authority: Section 25299.77, Health and Safety Code.

Reference: Sections 25299.13, 25299.52(a)-(b) and 25299.55, Health and Safety Code.

2813.3. Removal from the Priority List; Suspension and Rejection of Claims

...

(e) Notwithstanding subdivision (d)(1)-(2), for claims filed on or after January 1, 1997, if the information presented on the claim contains a material error, and the error resulted from fraud or misrepresentation on the part of the claimant, the Division may revoke the ~~claimant's~~claim's eligibility and may bar the claim from further participation in the Fund.

...

Authority: Section 25299.77, Health and Safety Code.

Reference: Sections 25299.13, 25299.37(a)-(c), 25299.52(a), 25299.54(a)-(b) and (d), 25299.55, 25299.56, 25299.57(a),(d)(2)-(3) and 25299.58(b)(3)-(4), Health and Safety Code.

Article 5. Request for Review, Appeal, and Petition Process

2814.2. Petition for Board Review and Response by the Division Chief

(a) A claimant may petition the Board for review of a Final Division Decision.

(b) A petition for Board review shall contain the following:

(1) the name and address of the petitioner;

(2) ~~a statement of the date on which the petitioner received the Division's final decision;~~

~~(3)~~ a copy of the Final Division Decision that the Board is requested to review;

~~(4)~~(3) an explanation why the claimant believes the Final Division Decision is erroneous, inappropriate, or improper;

~~(5)~~(4) a statement describing how the petitioner is damaged by the Final Division Decision; and

~~(6)~~(5) a description of the remedy or outcome desired.

...

Authority: Section 25299.77, Health and Safety Code.

Reference: Section 25299.56, Health and Safety Code.